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No. [redacted]10

In the Supreme Court of the United States.

OCTOBER TERM, 1930.

JOSEPH W. NICHOLAS, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1931

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOSEPH W. NICHOLAS, APPELLANT,
v.
THE UNITED STATES.
} No. 47.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims and is a companion case to that of *Wilson Scott Norris* v. *The United States*, No. 48, October Term, 1920. The facts presented, however, differ materially from that case. On motion of appellants, both cases were remanded for additional findings. In the present case the mandate of this court directed the Court of Claims "to set aside its judgment and reopen the case." Consequently it was tried *de novo* with the result that the court below found as facts two very material things, viz, that appellant never, after his removal, made an appeal to the Secretary of the Treasury to be reinstated and that the office occupied by appellant was filled

by another appointee on March 3, 1913, appellant having been removed on February 20, 1913, and that the office has since been held by another incumbent.

The findings of fact show that during the year 1911, the Secretary of the Treasury appointed a committee to investigate the conduct of the customs service and on August 24, of that year, the committee reported that appellant, while at some times an excellent officer, was at other times indifferent to his duties and had been suspended because of intoxication, and consequently the committee recommended his removal. The Secretary of the Treasury approved the recommendation and on February 19, 1913, directed the collector of customs at Baltimore to remove appellant "on account of the use of intoxicating liquors and the unsatisfactory and perfunctory manner in which he performs his work." On the next day, February 20, 1913, appellant was removed.

At the time of his removal, appellant was in the classified civil service, but no notice of any charges were given him nor was he afforded the opportunity to reply to the same. He was physically able and capable of resuming the duties of the office but never sought a revocation of his removal or applied for reinstatement.

CONTENTIONS.

Appellant rests his case on the proposition that he was removed contrary to the statute of August 24, 1912, and refers the Court to the argument in the *Norris* case to sustain his position that he is entitled to the salary of his office as an incident thereof.

The Government contends that its argument in the *Norris* case, No. 48, to which the Court is respectfully referred, bars recovery here. In addition the facts in this case show that,

1. Appellant abandoned his office.
2. That another person is and has been in possession of the office since appellant's removal.

ARGUMENT.

I.

TOTAL ABANDONMENT OR NONUSER OF AN OFFICE WORKS A FORFEITURE AND IS TANTAMOUNT TO A RESIGNATION.

Appellant was separated from his office on February 20, 1913, and from that date until the time he brought this suit on May 23, 1916, he took no active step to regain his office, either by requesting the Secretary to reinstate him, by protesting to the Secretary or by appealing to the courts. On the contrary he stood passively by, apparently acquiescing in his removal, and performing none of the duties or functions of his office. While the court below has found that he was physically able to perform the duties of his office, the findings do not disclose that he ever indicated his desire to have the order of removal revoked. Such facts lead only to the conclusion that appellant abandoned his office even were it to be held that he was not legally removed.

It has long been the law that neglect to perform the duties of a public office constitutes abandonment and consequently a forfeiture. Mechem says (Public Officers, Book II, sec. 435):

> Public offices are held upon the implied condition that the officer will diligently and faithfully execute the duties belonging to them, and while a temporary or accidental failure to perform them in a single instance or during a short period will not operate as an abandonment, yet if the officer refuses or neglects to exercise the functions of the office for so long a period as to reasonably warrant the presumption that he does not desire or intend to perform the duties of the office at all, he will be held to have abandoned it, not only when his refusal to perform was willful, but also where, while he intended to vacate the office, it was because he in good faith but mistakenly supposed he had no right to hold it.

It was so held in *People* v. *Hartwell*, 67 Calif. 11, where a duly elected officer failed to perform any of the duties of the office for a period of two years, owing to a mistaken notion that another had been elected to the office. In *Phillips* v. *Boston*, 150 Mass. 491, the court avoided the question of whether a police officer was illegally removed and held that nonuser over a considerable period of time was in itself an abandonment of the office. To the same effect are *Ide* v. *U. S.*, 25 C. Cls. 401–407; *Andrews* v. *Portland*, 79 Maine 484. In ex rel. *Arant* v. *Lane*,

249 U. S. 367, a delay of twenty months was considered a valid defense in an action in mandamus brought to recover possession of an office. Laches and abandonment being so closely related, this case is at least persuasive of the view this court would have taken had the defense of abandonment been interposed. (See also *Stone* v. *Board of Commissioners*, 164 Ky. 640.)

As a resignation by implication is practically the same as a forfeiture (Throop, Public Officers, sec. 407) and as such implication arises from facts clearly indicating an intent to abandon the office, it follows from the findings of the court below that appellant abandoned his office and forfeited whatever right he may have had to sue as a *de jure* officer for the emoluments of his office.

II.

Where the Office, from Which the De Jure Officer Is Excluded, Is Filled by a De Facto Officer, Who Performs the Duties and Receives the Emoluments of the Office, the De Jure Officer Can Not Recover the Salary of the Office During That Time.

The findings show that appellant was removed from his office on February 20, 1913, and that on March 3, 1913, the office formerly held by appellant was filled by a new appointment and has since been held by a person appointed by the Secretary of the Treasury, the appointing authority. Appellant attempts to attack this finding on the ground that

there was no evidence below to justify it, but this court has often said that it is not concerned with the testimony and evidence below but only with the ultimate facts as found. (*Burr* v. *The Des Moines Railroad and Navigation Co.*, 1 Wall. 99–102; *United States* v. *Smith*, 94 U. S. 214–218.) The findings could not be more conclusive than they are in this case. Appellant had been appointed an inspector of customs at the port of Baltimore and that was the position from which he was removed. The court finds that on March 3, 1913, there were only 33 positions of inspector of customs at Baltimore and that all of the offices were filled on and since March 3, 1913. The only possible deduction then is that either the office formerly occupied by appellant was filled or that it had been abolished.

While all of the authorities can not be reconciled as to whether or not a *de jure* officer can recover the salary of the office during the time it was paid to a *de facto* officer, yet the weight of authority favors the rule that there can be no recovery, and it is a general rule which is growing in favor.

In *Dolan* v. *Mayor* of New York, 68 N. Y. 274, 280, the Court said:

> It is clear that if the city could rightfully pay the salary of Keating during his actual encumbency, and has paid it, it can not be required to pay it again to the plaintiff. We are of opinion that payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defense to

an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession.

In *Lee* v. *Wilmington*, 1 Marvel (Delaware) 65, and *Coughlin* v. *McElroy*, 74 Conn. 397, which are in accord with the above principle, the authorities are fully reviewed and discussed. The reviewer, in a note to the case of *Nall* v. *Coulter*, 4 Ann. Cas. 671 (117 Ky. 747), finds the weight of authority favoring the principle proposition. The Supreme Court of Illinois, by overruling its former decisions, is now in accord with the weight of authority. *People* v. *Burdett*, 283 Ill. 124; *People* v. *Schmidt*, 281 Ill. 211. See also:

Brown v. *Tama Co.*, 122 Iowa, 745.
Saline County Comm. v. *Anderson*, 20 Kans. 298.
Wayne County v. *Benoit*, 20 Mich. 176.
Parker v. *Dakota County*, 4 Minn. 59.
Hunter v. *Chandler*, 45 Mo. 452.
McDonald v. *Newark*, 58 N. J. L. 12.
Samuels v. *Harrington*, 43 Wash. 603.
State v. *Moores*, 70 Nebr. 48–57.

It is therefore clear that the Government is not liable to pay two salaries for a single service and that appellant has no right to the salary of the office until the *de facto* officer who holds the office is ousted by proper proceedings.

CONCLUSION.

We submit, therefore, that there can be no recovery in this case for the reasons that appellant abandoned the office and forfeited his right to the

salary; and that the emoluments of the office have been paid to the incumbent who performed the duties, whether *de facto* or not.

In addition, we submit, by reference to our brief in the *Norris* case, that since the only issue in a suit of this nature is the title to the office, the right of action is barred by laches; and, further, since the suit is admittedly not based on a contract, express or implied, but is based on an alleged unlawful removal, and since the Court of Claims is not invested with jurisdiction to issue prerogative writs nor with statutory jurisdiction to try the title to a public office, that court is without jurisdiction in the premises.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILLIAM D. HARRIS, *Attorney.*

FEBRUARY, 1921.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

October Term, 1919.

JOSEPH W. NICHOLAS,
Appellant,

vs.

THE UNITED STATES.

No. [redacted]

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S MOTION FOR REMANDING OF RECORD.

BRIEF IN SUPPORT OF MOTION.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

IN THE

Supreme Court of the United States

October Term, 1919.

JOSEPH W. NICHOLAS, Appellant, vs. THE UNITED STATES.	No. 168.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S MOTION FOR REMANDING OF RECORD.

BRIEF IN SUPPORT OF MOTION.

Now comes the appellant and moves the Court to remand the record in this case to the Court of Claims, with instructions to that Court to take evidence by deposition or otherwise, and to certify therefrom the facts bearing upon the following points:

> "I. Whether or not Joseph W. Nicholas stood ready, willing and able to perform the duties of his office as inspector of customs during all the times covered by this action."

Appellant shows to the Court that there was no contradictory or conflicting evidence in the Court of Claims on the above point.

Appellant further shows that this motion is governed by the action of this Court of June 2, 1919, in ordering a remand in the case of *Wilson Scott Norris* v. *The United States*, No. 565, October Term, 1918, which motion was in effect, both in law and in fact, similar to this motion to remand. The grounds of similarity are as follows: Both Wilson Scott Norris and Joseph W. Nicholas were inspectors of customs in the port of Baltimore, and both were removed summarily and without charges, in violation of law, on February 20, 1913. Both brought suit in the Court of Claims to recover the salary of their office, and both had their petitions dismissed in the court below on the ground that there was no evidence in the record to show that the claimants stood ready, willing and able to perform the duties of their office.

With reference to the absence of evidence showing that the claimant stood ready, willing and able to perform the duties of his office, appellant shows that the petition alleges in paragraph VII, thereof (R. 2):

> "During all the time from the date of claimant's removal on February 20, 1913, as heretofore alleged, claimant has stood ready, willing and able to perform the duties of the office to which he was legally appointed, and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury, or his subordinates."

The petition was filed in the Court of Claims on May 23, 1916 (R. 1) and thereafter various departmental reports were filed constituting the evidence in the case. Under date of March 30, 1917, appellant, by his counsel, caused to be prepared a motion to be filed in the Court of Claims containing a stipulation in writing, which said motion was for the purpose of taking the testimony of the claimant in answer to certain written interrogatories, one of them reading as follows:

> "Since the 20th day of February, 1913, the date of your removal, have you or not, at all times stood ready, willing and able to perform the duties of the office of inspector of customs?"

The stipulation mentioned above, to which was annexed the interrogatories, was presented for approval to the attorney of the United States representing the defense in this case, for his approval and signature. The attorney for the United States read the stipulation and interrogatories and then and there stated that he would not agree to approve or sign even as to the question whether or not the claimant stood ready, willing and able to perform the duties of his office. The attorney for the Government gave as his reasons therefor that he did not wish to encumber the record. Counsel for claimant contended to the attorney for the Government that the Court might ask why claimant had not proven affirmatively his readiness, willingness and ability to perform the duties of his office. The Government's attorney replied that if the Court did that he would rise and say that there was sufficient proof in the record

and that the Government conceded as a fact, that claimant was ready, willing and able to perform the duties of the office. Relying upon this statement of the defense, appellant did not press the motion for the taking of testimony on this point.

This case, together with two other cases, involving the same law questions, were argued together before the Court of Claims on March 6, 1918. It was agreed between counsel on both sides and the Court that the argument of the law questions involved in the three cases should be made in one case, but with the understanding that the said argument should apply to the other two cases. On the 5th day of March, 1918, counsel for appellant called to the attention of the attorney for the Government that he had objected to claimant's request for Finding VII heretofore set forth. The objection in the brief of the Government to this finding was as follows:

> "Objected to because calling for a conclusion of law."

Counsel for appellant thereupon brought to the attention of the attorney for the Government the oral agreement heretofore mentioned as having been made on March 30th, 1917. The Government's attorney then stated that he regretted having made the objection, and in explanation thereof further stated that the conversation mentioned had passed out of his mind temporarily, but he then recalled it and said that on the argument the next day, in open court, he would express his regret to the Court and for the benefit of the record would concede that the claimant stood ready, willing and able to perform the duties of his office. When

this case was called for argument the following day the Government's attorney arose and informed the Court of the oral agreement of March 30, 1917, and then and there stated for the benefit of the record:

> "That the Government conceded that the claimant would have testified in answer to a written interrogatory that 'he was ready, willing and able at all times to perform the duties of his office.'"

This case was thereupon argued upon the various questions involved, the Court below making no comment on, or objection to this concession on the part of the Government.

Appellant's petition was dismissed for the reason, as it appears in Finding II (R. 5), that there was no evidence to show the willingness or the ability of appellant to perform the duties of his office.

Since his removal appellant has stood ready, willing and able at all times to perform the duties of his office and would have so testified in answer to the interrogatory heretofore mentioned and will so testify if given an opportunity by this Court.

Appellant further shows to the Court that on June 11, 1918, claimant filed a motion in the Court below for a new trial (R. 6) and for a remanding of the case to the General Docket for the taking of testimony. The Court below overruled this motion on June 17, 1918. In this motion for a new trial appellant caused to be submitted the affidavits of himself, of his counsel, Louis T. Michener, and of his attorney of record, William E. Russell. These affidavits set forth in detail the oral agreement made with the attorney for the Government with reference to the ques-

tion concerning appellant's readiness, willingness and ability to perform the duties of his office. The attorney for the United States filed a statement in reply to the aforesaid motion admitting herein that on the argument of the case he had made the concession heretofore set forth. Nevertheless, the motion was denied. Had the motion been allowed evidence would have been taken and it would have been proven that claimant stood ready, willing and able to perform the duties of his office.

JOSEPH W. NICHOLAS,
Appellant.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

STATE OF CONNECTICUT, }
County of Hartford, } ss.:

Personally appeared before me, a notary public in and for the County of Hartford, Joseph W. Nicholas, who, being duly sworn according to law, deposes and says: That he is the appellant in the above-entitled case; that he has read the foregoing motion and understands its contents, and that the matters and things therein stated are true in substance and in fact; as he is informed and verily believes.

JOSEPH W. NICHOLAS.

Subscribed and sworn to before me }
this 15th day of September, 1919. }

F. S. ILLINGWORTH,
(Seal) Notary Public.

APPELLANT'S BRIEF ON MOTION TO REMAND RECORD.

Nature of Action.

This action is to recover the salary due Joseph W. Nicholas as inspector of customs in the port of Baltimore, at the rate of $4.00 per diem from February 20, 1913, to and including September 30, 1917. Appellant was appointed inspector on the 30th day of August, 1900. He continued under this appointment to the 20th day of February, 1913. On this latter date he was summarily and arbitrarily removed without charges and in violation of the rules of the Civil Service Commission, the Customs Laws and Regulations and the Act of Congress of August 24, 1912 (37 Stat. 555).

No charges were furnished appellant, nor was he allowed a reasonable time for personally answering same in writing (R. 4).

ARGUMENT.

I.

Appellant's removal on February 20, 1913, was an absolute nullity, being unlawful, invalid and of no force and effect because it was contrary to the Civil Service Rules, the Customs Laws and Regulations and the Acts of Congress. Civil Service Rule No. XII, Section 2, as amended by

executive order of February 8, 1912, was in effect at the time of this removal. We set forth in part the aforesaid rule:

> "A person in the competitive service whose removal is proposed, shall be furnished with a statement of reasons and be allowed a reasons and be allowed a reasonable time for personally answering such reasons in writing * * *"

This rule was promulgated in the Treasury Department by T. D. No. 32,265, on February 12, 1912.

The Customs Laws and Regulations of 1908 were also in effect on the aforesaid date. Article 1383 of said regulations provides in part, as follows:

> "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or with another appointing officer, of which the accused shall have full notice and an opportunity to make defense."

Article 1386 of the aforesaid regulations provides in part, as follows:

> "At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the supervising officer for transmission to the Secretary of the Treasury within three days from date of receipt of the copy of the written charges."

There was also in effect at the time of his removal the Act of August 24, 1912, 37 Stat. 555, in part as follows:

> "Section 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service, and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing and affidavits in support thereof * * *"

There was no attempt made by the Treasury Department to comply with any of the foregoing requirements and appellant was arbitrarily, unlawfully and without notice removed form his office. *United States* v. *Wickersham*, 201 U. S., 390; *United States, ex rel. Newcomer* v. *Postmaster*, 221 Fed. 687.

II.

As appellant's removal was in violation of law he has never been lawfully removed and it follows that he is entitled to the salary of his office. The authorities are numerous and harmonious on this point.

Fitzsimmons v. *Brooklyn*, 102 N. Y. 536.
United States v. *Wickersham*, 201 U. S. 390.
Garvey v. *Lowell*, 199 Mass. 47.
Tucker v. *Boston*, 223 *ib.* 478.

Andrews v. *Portland*, 79 Me. 484.
Everill v. *Swan*, 20 Utah 56.
Houston v. *Estes*, 35 Tex. Civ. App. 99.
State ex rel. Dennison v. *St. Louis*, 90 Mo. 19.
Leonard v. *Terre Haute*, 93 N. E. 872.
Seifen v. *Racine*, 129 Wis. 343.
People v. *Stevenson*, 272 Ill. 215.

The foregoing cases agree that the salary of an office is an incident thereof and that the legal title to the office carries the right of salary with it.

The *Wickersham case*, *supra*, was similar to the instant case as it involved a removal without charges. This Court held that the removal was a nullity and that Wickersham was entitled to the salary of his office during the period of removal.

III.

We do not understand that the rule has ever been established that a public officer, who has been unlawfully removed must prove affirmatively that he was ready, willing and able to perform the duties of his office during the period of removal in order to recover the salary thereof. If the salary attaches to the office as an incident thereof, it would seem to follow that he who holds legal title thereto must be entitled to the salary. Therefore, readiness, willingness and ability are presumed, on the part of one who is an officer "*de jure*." There are many cases that hold that a claimant for the salary of an office, may still recover same even though he had other employment during the period of unlawful removal. In the *Fitzsimmons case*

(*supra*), the claimant had other employment and received another salary during the time he was ousted from his office, but he was awarded the salary of his office on the ground that "the salary attached thereto as an incident thereof." The same conditions existed and the same rule was followed in.

State ex rel. Chapman v. *Walbridge*, 153 Mo. 194.
Houston v. *Estes* (*supra*).
Everill v. *Swan* (*supra*).

IV.

If, however, it should be deemed necessary that appellant prove his willingness, readiness and ability to perform the duties of his office as a condition of recovery, it is respectfully submitted that the concession made by the attorney for the Government, as heretofore alleged, was competent evidence and sustained the averments of paragraph th of the petition heretofore set forth. Appellant vels that he has been aggrieved by the action of he Court below in dismissing the petition when ounsel for the Government made the concession set forth herein. Therefore, appellant submits this Court deems this point material, that this se should be remanded to the Court below with structions to take evidence on the point, and rtify the facts to this Court. We submit and te to the Court that there was no conflicting idence in the Court below, and that the findings incomplete and inconclusive. We submit that

these deficiencies in the findings can be remedied and justice done to both parties hereto by remanding the record to the Court below, with instructions to find and certify as requested by the motion.

V.

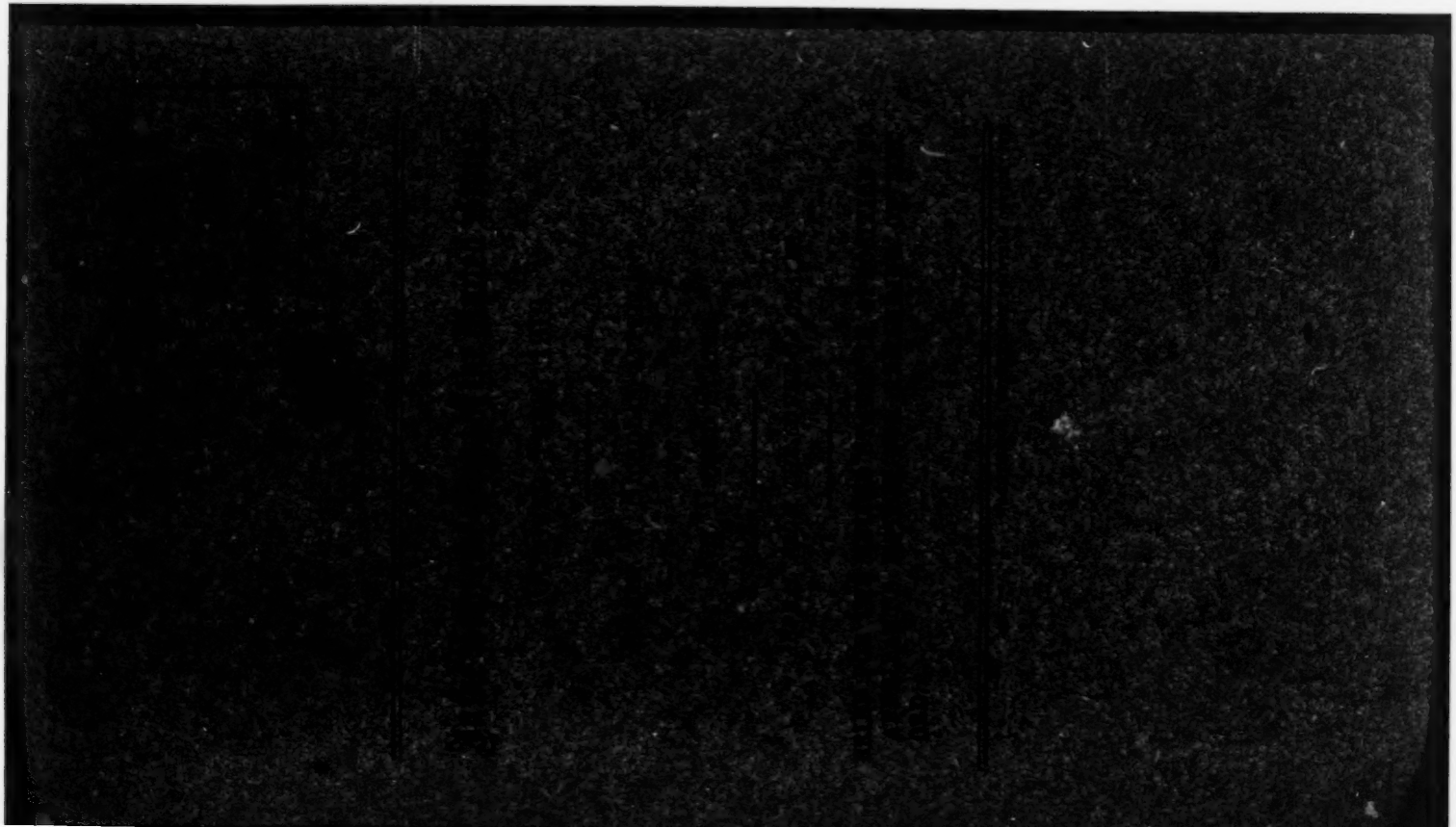
This motion is governed by the action of this Court of June 2, 1919, in ordering a remand in the case of Wilson Scott Norris v. *The United States, No. 565, October Term, 1918, which motion was in effect, both in law and in fact, similar to this motion to remand.*

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

CERTIFICATE.

We, as appellant's counsel, hereby certify that in our opinion this motion for a remanding of the record is well founded in law, is in the interest of justice, and is not interposed for the purposes of delay.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

JOSEPH W. NICHOLAS, APPELLANT,
v.
THE UNITED STATES. } No. 168.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLANT'S MOTION FOR REMANDING OF RECORD.

STATEMENT.

Appellant was in the classified civil service of the United States on and prior to January 20, 1913, holding the position of inspector of customs at the port of Baltimore. On January 20, 1913, he was discharged from the service of the United States. On May 23, 1916, he filed his petition in the Court of Claims, claiming that his removal was invalid and asking judgment against the United States for $4,740, as compensation from February 20, 1913, to and including May 20, 1916. By an amendment to his petition the amount claimed was increased to $6,732 and included the period from February 20, 1913, to September 30, 1917. Evidence was taken in the case; it was tried by the Court of Claims on March 6,

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1918, and on May 13 judgment was entered against appellant. The record sets forth the findings of fact made by the Court of Claims upon the evidence introduced.

In paragraph VII of the petition in the Court of Claims (R., 2) claimant alleges:

> VII. During all the time from the date of claimant's removal on February 20, 1913, as heretofore alleged, claimant has stood ready, willing, and able to perform the duties of the office to which he was legally appointed and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury or his subordinates.

The Court of Claims finds (Finding II, R., 5):

> There has been no evidence taken in this case to show either the willingness or the ability of the plaintiff to perform the duties of his office as inspector of customs from the date of his removal from the service on February 20, 1913. It does not appear that he made any report in person or in writing to the office of the collector of customs at Baltimore.
>
> The plaintiff is the sole owner of this claim, and no assignment or transfer of the claim, or any part thereof or interest therein, has been made.

Appellant's motion in this court is—

> to remand the record in this case to the Court of Claims, with instructions to that court *to*

take evidence by deposition or otherwise, and to certify therefrom the facts bearing upon the following points:

1. Whether or not Joseph W. Nicholas stood ready, willing, and able to perform the duties of his office as inspector of customs during all the times covered by this action.

This is the only finding of fact the court is requested to make—that is, whether or not appellant was ready, willing, and able to perform the duties of his office, as alleged in his petition. This court is asked to direct the Court of Claims to now take evidence upon which to base this requested finding, not to find it from the evidence before it.

ARGUMENT.

I.

It was incumbent upon appellant to introduce evidence to establish the affirmative allegation made in paragraph VII of his petition. The Court of Claims finds, definitely (R., 5): "There has been no evidence taken in this case to show either the willingness or the ability of plaintiff to perform the duties of his office * * *." This finding of the Court of Claims is conclusive. (*United States* v. *New York Indians*, 173 U. S. 464.) The fact that appellant now asks that the Court of Claims be required to take evidence upon this question upon which to base a finding shows that there is no evidence as to this in the record.

II.

What appellant is really asking is for a new trial. Applications for new trials in the Court of Claims are governed by rules 90 to 95 of that court. (A copy of these rules will be found in the appendix to this brief.)

Clearly the only reason for a new trial appellant could urge would be that set forth in his motion, namely, that he be given the opportunity to introduce evidence to support the allegations of paragraph VII of his petition. Upon no possible theory could this come under the head of newly discovered evidence, as defined by the said rules. Therefore the Court of Claims rightly overruled the motion made to it for a new trial.

III.

Appellant is incorrect in his statement that the attorney for the Government stated that "he would rise and say that there was sufficient proof in the record and that the Government conceded as a fact that claimant was ready, willing, and able to perform the duties of his office." Obviously, no such statement would or could be made as to a record which admittedly contained *no* evidence upon this matter.

Counsel for appellant has evidently confused this case with a similar case in which there was some evidence upon this point in the record. The attorney for the Government did admit that if the question set forth on page 3 of appellant's brief, namely:

> Since the 20th day of February, 1913, the date of your removal, have you or not, at all times stood ready, willing and able to per-

> form the duties of the office of inspector of customs?

had been asked appellant, the answer would have been in the affirmative. No agreement was made as to the *fact;* but only that the witness would answer "yes" to a given interrogatory. No agreement was made as to the sufficiency or competency of the answer to establish the fact or as to the relevancy, the question being Paragraph VII of appellant's petition propounded to appellant as an interrogatory. There was no refusal of any request to take evidence of any character appellant might have desired; appellant had the right to produce whatever evidence he considered proper or necessary, and this right could not be taken from him. Giving the stipulation set forth on page 5 of appellant's brief the greatest possible effect (and admittedly it embodies all of any stipulation that may have been made by counsel below), it is not evidence and could not be considered if certified to this court. (*Burr* v. *The Des Moines Railroad & Navigation Co.*, 1 Wall. 99.)

It was incumbent upon appellant to establish all the material allegations of his petition by some competent evidence. (*United States* v. *Ross*, 92 U. S. 281.) The Court of Claims is bound by law and the rules of this court to find facts from such evidence; it can not use statements of counsel for this purpose. It is evident that the Court of Claims did not consider that any sufficient evidence on that point was before it. No evidence of any acts of the plaintiff was attempted. There was no intention to mislead

counsel for appellant, and if the allegation could have been proved it is regretted that it was not.

IV.

Appellant claims that this motion is governed by the action of this court on the motion to remand in the case of *Norris* v. *United States*, No. 565, October term, 1918. We think not. It is true that the motion in that case was to remand the record to the Court of Claims "to take evidence by deposition or otherwise and to certify therefrom the facts bearing upon the following points."

This motion was not opposed by the Government. It appears from it that there was evidence in the record on the first two findings requested; and also that the third finding, which is identical with the sole finding requested in the motion now before the court, was claimed by the appellant in that case to be supported by evidence in the record, *additional* to the claimed stipulation of counsel, namely, letters to the Secretary of the Treasury. (Appellant's motion in *Norris* v. *United States*, No. 565, October term, 1918, p. 5.) There is admittedly no evidence of any kind in the present record.

The entry in the Norris case is as follows:

> On consideration of the motion of the appellant to remand this cause to the Court of Claims for further finding of facts,
>
> *It is now here ordered by the Court*, That said motion be, and the same is hereby, granted.
>
> JUNE 2, 1919.

We take it that the cause was remanded for further finding of facts from the record and not for a new trial, which would be the effect if the remand was to compel the Court of Claims to take evidence. As stated above, this motion was not opposed by the Government. There is no provision in law for the Court of Claims to take evidence. If it is considered that the parties should be allowed to introduce additional or different evidence, that privilege can only be afforded by a new trial. The motion was regarded by the Government as a motion to remand for further findings of fact under the established practice. (*Ripley* v. *United States*, 220 U. S. 491.)

We think it proper to advise the court that appellant in the Norris case has considered the entry sustaining his motion as authorizing the taking of further testimony, which he has accordingly done. His testimony has been filed in the Court of Claims, and that court is now asked to find facts from said evidence and certify the same to this court. It is submitted that a remand of a record to the Court of Claims for additional findings of fact requires such findings to be made from the evidence before the court, and does not authorize the taking of additional evidence. That additional evidence can only be taken when a new trial is granted and the trial court has the opportunity not only to find such facts as may be established by the new evidence, but to modify its judgment if the additional facts found so require.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

APPENDIX.

RULES OF THE COURT OF CLAIMS RELATIVE TO NEW TRIAL.

90. Whenever it is desired to question the correctness or the sufficiency of the court's findings of fact or its conclusions or to amend the same, the complaining party shall file a motion, which shall be known and may be considered as a motion for a new trial. All grounds relied upon for any or all of said objects shall be included in one motion. After the court has announced its decision upon such motion, no other motion by the same party shall be filed unless by leave of court.

Motions for new trial, except as provided by section 1088 of the Revised Statutes (sec. 175 of the Judicial Code), shall be filed within 60 days from the time the judgment of the court is announced.

91. A motion for a new trial other than under Revised Statutes, section 1088, must be founded upon one or more of the following grounds: First, error of fact; second, error of law; and, third, newly discovered evidence.

92. A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion.

93. A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.

94. A motion by the claimant upon the ground of newly discovered evidence will not be entertained unless it appear therein that the newly discovered evidence came to the knowledge of the claimant, his attorney of record, or counsel after the trial and before the motion was made; that it was not for want of due diligence that it did not sooner come to his knowledge; that it is so material that it would probably produce a different judgment if the new trial were granted; and that it is not cumulative.

Such motion must be accompanied by the affidavit of the claimant or his attorney of record, setting forth—

First. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence.

Second. The name, occupation, and residence of each and every witness whom it is proposed to call to prove said facts.

Third. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel was employed at the trial, were unknown to such counsel until after the close of the trial.

Fourth. The reasons why the claimant, his attorney of record, or counsel could not have discovered said evidence before the trial by due diligence.

95. Motions for a new trial must also be accompanied by the brief of the moving party, a copy of which must be served upon the opposing party, who may file his brief in response thereto. The motion will be considered by the judges in conference upon such briefs and affidavits, if any, and will there be decided or sent to the law calendar for argument.

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